Testimony of Sarah H. Cleveland
H. Res. 97 and the Appropriate Role of Foreign Judgments in the Interpretation of American Law
House Judiciary Subcommittee on the Constitution
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Thank you for inviting me to address your subcommittee regarding proposed House Resolution 97 and the role of international and foreign judgments in constitutional interpretation. At the outset, I should note that the views I express are my own as a scholar of international law and the constitutional law of foreign relations, and do not reflect the views of either the University of Texas School of Law or Columbia Law School, where I am visiting for the 2005-06 academic year.

Proposed House Resolution 97 is contrary to over 200 years of American constitutional tradition. Throughout our nation's history, members of the federal judiciary routinely have considered international and foreign sources of law in the adjudication of constitutional questions.[1] The judges who have employed this practice include the most illustrious jurists this country has known, including Chief Justice John Marshall, Chief Justice Taney, Justices Story, Field, John Marshall Harlan, Cardozo, Sutherland, Jackson, and Frankfurter, and Chief Justice Earl Warren. At least seven members of the current Supreme Court have embraced the use of foreign authorities in their writings on and off the bench, including Chief Justice Rehnquist, who wrote in 1989 that he supported having U.S. courts look to "the decisions of other constitutional courts to aid in their own deliberative process."[2]

International and foreign sources of law have been employed for a variety of purposes, in a wide range of constitutional contexts. It is common, for example, for jurists to explain a domestic rule by distinguishing it from foreign practice or

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[1] My testimony is based in part on my forthcoming article "Our International Constitution" in the *Yale Journal of International Law*.

[2] William H. Rehnquist, Constitutional Courts – Comparative Remarks (1989), reprinted in GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE – A GERMAN-AMERICAN SYMPOSIUM 411, 412 (Paul Kirchof & Donald P. Kommers eds., 1993).

to use foreign or international examples for empirical purposes to test the likely results of a particular constitutional hypothesis, as Justice Scalia did in *Lawrence v. Texas*.[3] Even these uses of foreign authority in delineating constitutional meaning, however, may be contrary to House Resolution 97.

The Supreme Court also has recognized that our constitutional design and traditions invite consideration of international and foreign authorities a variety of ways.

In its strongest form, the Constitution expressly commands consideration of international rules, in the authorization in Article I, Section 8 for Congress to define and punish offenses against the law of nations. The Court has construed that clause in light of international law to uphold Congress' establishment of military tribunals[4] and laws regarding piracy[5] and counterfeiting,[6] among others.

Other constitutional provisions refer to concepts of international law such as "war" or "treaties." Such provisions appear to invite consideration of international rules, and the Court has interpreted them in light of international rules and foreign practice to promote comity and respect for U.S. relations with other nations. Constitutional war powers decisions accordingly have drawn heavily from contemporary international law norms.[7] As early as the War of 1812, Chief Justice Marshall opined with respect to the Declare War clause that "[i]n expounding [the] constitution, a construction ought not lightly to be admitted which would give to a declaration of war an effect in this country it does not possess elsewhere."[8]

The Supreme Court also has looked to international and foreign sources to address structural questions in relations between the states. In the first year law school classic *Pennoyer v. Neff,* for example, the Court analogized to international rules governing the

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[3] 539 U.S. 558, 604 (2003) (Scalia, J., dissenting) (pointing to Canadian practice); see also Printz v. United States, 521 U.S. 898, 977 (Breyer, J., dissenting).

[4] E.g., Ex parte Quirin, 317 U.S. 1, 28 (1942); Application of Yamashita, 327 U.S. 1, 7 (1946).

[5] United States v. Smith, 18 U.S. (5 Wheat.) 153, 157 (1820).

[6] U.S. v. Arjona, 120 U.S. 479, 487 (1887).

[7] E.g., The Prize Cases, 67 U.S. (2 Black) 635, 666 (1863); Ex Parte Quirin, 317 U.S. 1, 27-28 (1942); Application of Yamashita, 327 U.S. 1, 12 (1946).

[8] Brown v. United States, 12 U.S. (8 Cranch) 110, 124 (1814).

territorial jurisdiction of sovereign nations to conclude that Fourteenth Amendment due process barred state courts from exercising jurisdiction over out of state defendants.[9] The Court has employed a similar approach in cases involving the Full Faith and Credit Clause and state powers of taxation.[10]

In numerous cases involving the government's power to regulate immigration,[11] to govern Indian tribes,[12] to acquire and govern new territories[13] to exercise the power of eminent domain[14] and to borrow money,[15] the Court has interpreted the powers of Congress to be consistent with sovereign powers enjoyed by other foreign governments. Accordingly, in *Fong Yue Ting v. United States,* the Court upheld Congress' power to expel Chinese immigrants based on powers over aliens recognized under international law.[16]

Finally, to the extent that the Constitution's individual rights provisions incorporate assumptions about the basic rights of all human beings, the Court has recognized that international rules regarding basic human rights and shared common societal values are an appropriate sounding board for the scope and meaning of constitutional norms. This practice long predated the decisions in *Lawrence v. Texas* and *Roper v. Simmons*, and recognizes, as did the Declaration of Independence, that our constitutional tradition incorporates principles of common "inalienable rights." Thus, general concepts of individual rights such as "liberty" and "cruel and unusual punishments" that the drafters incorporated into the Constitution reasonably invoke the shared fundamental values of the global community.

In the context of Fifth and Fourteenth Amendment due process, the Court has looked to shared community values to determine what provisions in the Bill of Rights are sufficiently

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[9] Pennoyer v. Neff, 95 U.S. 714, 722 (1877).
[10] Haddock v. Haddock, 201 U.S. 562 (1906); Pullmans Palace Car Co. v. Pennsylvania, 141 U.S. 18 (1891).
[11] Chae Chan Ping v. United States, 130 U.S. 581, 603-606 (1889).
[12] United States v. Kagama, 118 U.S. 375, 380-82 (1886); Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279-80 (1955).
[13] Jones v. United States, 137 U.S. 202, 212–13 (1890); Dorr v. United States, 195 U.S. 138, 140, 142, 146 (1904).
[14] Kohl v. United States, 91 U.S. 367, 371 (1875).
[15] Julliard v. Greenman, 110 U.S. 421, 447 (1884).
[16] 149 U.S. 698, 706-711 (1893).

fundamental to "principles of ordered liberty" to warrant incorporation against the states or to otherwise prohibit government intrusion. Over a century ago, *Hurtado v. California*[17] expressly recognized the relevance of foreign practices to this constitutional inquiry:

> The constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of the English law and history; but it was made for an undefined and expanding future, and for a people gathered, and to be gathered, from many nations and of many tongues; and while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. . . . There is nothing in Magna Carta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age. . . [18]

Likewise, for nearly a century, the Supreme Court has recognized that the "cruel and unusual punishments" clause was not limited to eighteenth-century conceptions of cruelty, but "may be . . . progressive, and . . . acquire meaning as public opinion becomes enlightened by a humane justice."[19] Chief Justice Warren's plurality opinion in *Trop v. Dulles* accordingly asserted that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[20] In *Trop*, the plurality relied almost entirely on the practices of other nations to conclude that loss of citizenship was an improper punishment for a crime.[21] Although the dissent disagreed with the plurality's interpretation of international opinion, it appears

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[17] 110 U.S. 516 (1884) (murder prosecution by information did not violate due process).

[18] *Id.* at 530-31 (emphasis added). See discussion in Gerald Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT'L L. 82, 83 (2004).

[19] Weems v. United States, 217 U.S. 349, 373, 378 (1910).

[20] 356 U.S. 86, 100-101 (1958) (plurality opinion).

[21] *Id.* at 102-103 & nn. 37, 38.

that at least eight of the nine Justices in *Trop* agreed that international opinion was relevant to the constitutional analysis before the Court. Judicial support for the relevance of foreign sources to the definition of cruel and unusual punishment now has a lengthy pedigree in decisions such as *Coker v. Georgia*,[22] *Enmund v. Florida*,[23] *Thompson v. Oklahoma*,[24] and *Atkins v. Virginia*.[25] Although Justice Scalia opposes the use of foreign authority to interpret constitutional meaning, even he has acknowledged that "[t]he practices of foreign nations . . . can be relevant to determining whether a practice uniform among our people is . . . so 'implicit in the concept of ordered liberty' that it occupies a place not merely in our mores but, text permitting, in our Constitution as well."[26]

The citations to foreign sources of law in the recent decisions in *Lawrence v. Texas* and *Roper v. Simmons* were fully consistent with this constitutional tradition. The Court's opinion in *Lawrence* cited British and European authorities largely to rebut the assertion in *Bowers v. Hardwick* that homosexual sodomy was universally condemned by western civilization.[27] In *Roper v. Simmons*, the Court first found an evolving national consensus prohibiting the execution of persons who were under the age of 18 at the time of the crime. Six members of the Court separately agreed that international law was relevant to confirm the determination of "society's evolving standards of decency" under the Eighth Amendment.[28]

In most of the contexts I have mentioned, international law and foreign practice is considered merely for its persuasive force as reflecting the rules and considered judgment of the society of nations. The Court's use of foreign sources, however, has not been

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[22] 433 U.S. 548, 592 n. 4, 596 n. 10 (1977) (plurality opinion).

[23] 458 U.S. 782, 796-97 n. 22 (1982).

[24] 487 U.S. 815, 830-31 & nn. 31, 34 (1988) (plurality opinion); *id.* at 851 (O'Connor, J.).

[25] 536 U.S. 304, 316 n. 21 (2002).

[26] Thompson v. Oklahoma, 487 U.S. 815, 869 n. 4 (1988).

[27] *Id.* at 2481; see Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (Burger, C.J., concurring). The Texas appellate court in *Lawrence* likewise had justified its reaffirmation of *Bowers* with references to Roman law and Blackstone. Lawrence v. State, 41 S.W.3d 349, 361 (2001).

[28] Although Justice O'Connor disagreed with the majority's identification of a national consensus prohibiting the execution of juveniles, she agreed that international law was relevant to Eighth Amendment analysis.

restricted to the original understanding of the drafters of the Constitution. Instead, the Court has employed many of the ordinary modes of constitutional analysis–text, structure, history, doctrine, and pragmatism–to support resort to foreign authority, and the Court generally has viewed contemporary foreign practice and international rules as the appropriate normative reference.

In *Boos v. Barry*,[29] for example, the Supreme Court addressed the constitutionality, under the First Amendment, of a District of Columbia ordinance that prohibited certain protests outside of foreign embassies. The United States government argued that the ordinance should be presumed constitutional because international treaties and customary international law regarding the treatment of diplomats gave the government a compelling interest in regulating protests outside of embassies. The Supreme Court recognized that current U.S. obligations under treaties and customary international law gave the United States a "vital national interest" in protecting the "dignity" of foreign embassies.[30] Although the Court ultimately resolved the case on other grounds, the case makes clear that in some contexts it would be difficult to conduct even First Amendment analysis without considering contemporary international law.

Despite how the question has been portrayed in recent debates, the use of international and foreign sources of law is not an issue of liberal versus conservative or Democrat versus Republican. The current administration has relied heavily on international law in arguing for broad constitutional authority for the President to wage the war on terror, whether by detaining enemy combatants or establishing military tribunals. In *Hamdi v. Rumsfeld*,[31] lawyers for the government argued that the President's constitutional power to detain enemy combatants derived from the international laws of war, and Justice O'Connor's plurality opinion invoked international law to uphold a qualified power of the President to detain enemy combatants.[32]

My primary point in offering these examples is to underscore the extent to which reliance on international and

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[29] 485 U.S. 312 (1988).

[30] 485 U.S. at 322-23.

[31] 124 S.Ct. 2633 (2004).

[32] Id. at 2641 ("longstanding law-of-war principles" included the right to prevent enemy combatants from returning to the battlefield during an armed conflict.)

foreign sources is fully part of the American constitutional heritage. The cases I have discussed largely remain the operative legal doctrines, with the result that foreclosing consideration of foreign authority in constitutional analysis would pull the rug from beneath many of our core constitutional values, including the doctrines delineating many of the powers of this Congress.

Judicial consideration of foreign authority does not mean, moreover, that consideration of foreign authority either delegates control over our constitutional values to foreign governments, or is contrary to our democratic traditions. Ultimately, it is our own domestic Constitution, interpreted by our own duly appointed judges, that determines the relevance of foreign authorities to its operation, and any particular constitutional provision may pose a barrier to consideration of foreign sources, whether through text, structure, history, or doctrine.

Sensitivity to the constitutional design is particularly important under the U.S. Constitution given the mixed attitude of the Framers themselves toward prevailing international norms. The drafters of the Constitution were well versed in foreign law. They had carefully studied other democratic and federal systems, and they intended for the United States to take its place among the community of nations by adhering to international law. Thomas Jefferson considered the law of nations "an integral part . . . of the laws of the land," and John Jay, one of the authors of the Federalist Papers and the first chief justice of the United States, proclaimed that "the United States had, by taking a place among the nations of the earth, become amenable to the laws of nations."[33] Indeed, compliance with international law was critical to help protect the fledgling nation from retaliation by powerful foreign states, and it would be surprising if the founders expected the government's powers to be construed isolation from international rules.

On the other hand, it is also true that the Constitution was deliberately designed to reject some customary international practices–rules that had developed through the practices of authoritarian states. Traditional powers of sovereign prerogative such as warmaking were constitutionally limited and distributed, and the right to jury trial rejected European inquisitorial systems. Certain provisions of the Bill of Rights, such as the First

[33] See Harold H. Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 44 & n.3 (2004) (discussing resort to international authority in the founding era).

Amendment's free speech provisions and the Third Amendment's prohibition against quartering of soldiers, were intended to impose limits on governmental authority that were uncommon, or even unknown, in the era. Any effort to determine the appropriate relationship between foreign legal sources and the Constitution accordingly must recognize that our founding document both received and rejected contemporary international rules and practices.

Determining when it is appropriate to consider international sources and what role they should play in relation to a constitutional structure raises difficult questions in any constitutional system. But this interpretive determination is a quintessential matter for judicial expertise, and our two centuries of experience demonstrate that it must be addressed discretely on a case-by-case basis. It is not a question appropriate for resolution by Congress through blanket disapproval of judicial consideration of foreign and international law.